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No. 95-83

In The

Supreme Court of the United States

October Term, 1995

Alan Meghrig and Margaret Meghrig,
Petitioners,

vs.

KFC Western, Inc.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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vs.

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BRIEF FOR THE BI-STATE DEVELOPMENT AGENCY OF THE MISSOURI-ILLINOIS METROPOLITAN DISTRICT AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE AMICUS CURIAE

Amicus Curiae, the Bi-State Development Agency of the Missouri-Illinois Metropolitan District ("Bi-State"), is a body corporate and politic organized pursuant to a compact between Missouri and Illinois.[1] Mo.Rev.Stat. § 70.370 (1994); Ill.Rev.Stat.

[1] Although Bi-State has been designated as a body politic pursuant to its states' enabling legislation, the United States Court of Appeals for the Eighth

(Footnote 1 continued on next page)

ch. 127, ¶ 63 r-1 (1989) (identical compact provisions). The compact creates a single interstate agency to coordinate regional planning and development of the Bi-State Metropolitan Development District (the "district"). The district is comprised of the geographical areas of the City of St. Louis, Missouri, the Missouri counties of St. Louis, St. Charles, and Jefferson, and the Illinois counties of Madison, St. Clair, and Monroe. Mo.Rev.Stat. § 70.370, art. II.

Bi-State has a significant measure of autonomy, including all necessary and appropriate powers to develop the district, and is funded by farebox receipts, sales tax revenues from its service area and from federal grants. *Id.* § 70.370, art. VI. Bi-State can buy and sell land, facilities, and equipment, borrow money, issue bonds, condemn property, enter into contracts on its own behalf, and sue and be sued on its contracts. *Id.* § 70.373; Ill.Rev.Stat. ch. 127, ¶ 63 s-9. Bi-State coordinates the district's streets, highways, parkways, parking areas, terminals, water supply and sewage and disposal works, recreational and conservation facilities and projects, and land use pattern. Mo.Rev.Stat. § 70.370 art. III (2).

The primary mission of Bi-State is to provide public mass transportation in the St. Louis Metropolitan area. Currently, Bi-State operates bus transportation and the MetroLink light rail system within its district. In addition to owning facilities to house mass transportation operations, Bi-State has acquired significant numbers of parcels of property and rights-of-way to

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(Footnote 1 continued)

Circuit has declared Bi-State to be more like a local government entity than an arm of the compacting states. *Barket, Levy & Fine v. St. Louis Thermal Energy*, 948 F.2d 1084, 1088 (8th Cir. 1991). In that Bi-State may not be considered a political subdivision of a state under Supreme Court Rule 37.5, Bi-State has obtained, and filed separately with the court, written consent from both parties .

construct MetroLink stations and to operate the system currently on line. Extensions of MetroLink have been planned and are in the early stages of implementation. To implement these plans of expansion and to further Bi-State's mission to provide cost and energy efficient mass transportation, it will be necessary for Bi-State to acquire, own and operate significantly more property in the future.

Much of the property acquired by Bi-State to date has been taken by exercise of its power of eminent domain. Many parcels acquired have contained environmental hazards, including underground storage tanks, hydrocarbon contamination, asbestos, and polychlorinated biphenyls (PCBs). In each instance, Bi-State has in no way contributed to the contamination of the parcels and is an innocent land owner. With respect to many of the parcels, Bi-State had no choice in deciding whether to acquire the property, as it lay along a right-of-way selected by a metropolitan planning agency in accordance with federal law. Bi-State has been compelled to clean up the property, after it was acquired, to render it fit for its intended use as a MetroLink station or rail line. Fundamental unfairness would result if Bi-State and the taxpayers of its service communities were forced to incur the cost of cleaning property contaminated by previous owners and operators who, in many instances, benefitted from the property by operating business enterprises for profit.

In sum, Bi-State believes that the United States Court of Appeals for the Ninth Circuit properly interpreted the citizens suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a) in the instant case. RCRA's citizen suit provision invokes the equitable jurisdiction of the district courts to grant all traditional equitable remedies, including restitution. RCRA does not clearly and unmistakably limit that jurisdiction. Bi-State supports the position of respondent that RCRA authorizes the district courts to award private parties restitution of cleanup costs and that RCRA's limitation to sites

that pose "imminent and substantial endangerment" does not bar restitution of costs of cleaning up contamination that posed a threat in the past.

SUMMARY OF ARGUMENT

The district courts' traditional equitable powers are indispensable to the independence of the Judiciary and to the maintenance of our tripartite system of government. Although Congress may limit the district courts' equitable powers, decisions of this Court make clear that once Congress invokes the district courts' equitable jurisdiction, Congress may not limit that jurisdiction unless it unequivocally expresses its intent to do so. This Court requires Congress to state its intent to limit the district courts' equitable juri sdiction clearly and unmistakably to prevent the aggrandizement of Congress at the expense of the courts. Garbled whispers by Congress in a statute's legislative history definitely should not displace rules refined over centuries by a co-equal branch of government acting in its area of expertise.

In enacting the citizen suit provision of RCRA , 42 U.S.C. § 6972(a)(1)(B), Congress invoked the district courts' equitable jurisdiction without clearly and unmistakably limiting the scope of that jurisdiction. As a result, RCRA's citizen suit provision empowers the district courts to exercise all their traditional equitable powers. Those traditional equitable powers include the power to grant restitution. Granting a landowner restitution from the prior owner who caused the contamination of the property furthers two of Congress' policy goals under RCRA, namely, promoting prompt remediation of contamination and

assuring that the party responsible for the contamination incurs the costs of remediation.[2]

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[2] Although this amicus brief does not discuss how the "imminent and substantial endangerment" clause of RCRA's citizen suit provision should be interpreted, Amicus Bi-State agrees with, and joins in, the arguments presented in the Brief of Amici Curiae Massachusetts, Missouri, etc., that construing the "imminent and substantial endangerment" clause to preclude parties who have incurred costs of remediation prior to filing a RCRA citizen suit from pursuing restitution under RCRA's citizen suit provision would be inconsistent with Congress' invocation of the district courts' equitable jurisdiction and would be inconsistent with Congress' policy concern of promoting prompt remediation. Moreover, Amicus Bi-State believes that regardless of how this Court interprets the "imminent and substantial endangerment" clause, this Court should decide the extent of the district courts' equitable jurisdiction under RCRA's citizen suit provision so that parties faced with decisions regarding the appropriate means of addressing contamination that "may present an imminent and substantial endangerment" can conduct their affairs with a clear understanding of their rights under RCRA's citizen suit provision.

ARGUMENT

The District Courts Are Empowered To Award Restitution Under RCRA's Citizen Suit Provision Because Congress Did Not Clearly And Unmistakably Limit The Broad Equitable Jurisdiition Of The District Courts And The Remedy Of Restitution Promotes RCRA's Statutory Purposes.

A. The District Courts Are Empowered To Grant All Traditional Equitable Remedies, Including Restitution, Because RCRA's Citizen Suit Provision Invokes The Broad Equitable Jurisdiction Of The District Courts Without Clearly And Unmistakably Limiting That Jurisdiction.

1. Our government is one of separated powers, with an independent Judiciary to check the excesses of the other branches and to protect individual rights. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). From the very inception of our Republic, the drafters of the Constitution viewed equitable jurisdiction as playing an indispensable role in securing the independence of the Judiciary and, consequently, in maintaining separation of governmental powers. Thus, our Constitution extends "[t]he judicial Power ... to all Cases, in Law and *Equity*, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ...." U.S. Const. art. III, § 2, cl. 1 (emphasis added). Alexander Hamilton thought equitable jurisdiction of such importance to the Judiciary that he expounded on its necessity:

> It has also been asked, what need of the word "equity"? What equitable causes can grow out of the constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud, accident, trust* or *hardship*,

> which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states.

The Federalist No. 80 at 406-07 (Alexander Hamilton) (Gary Wills ed. 1982).

The early decisions of this Court also recognize the role equity plays in maintaining the separation of powers and in securing an independent Judiciary. A century and a half ago, Justice Johnson spoke of the indispensability of that jurisdiction to the exercise of judicial power:

> For, as an essential branch or exercise of judicial power, [equitable jurisdiction] is acknowledged to exist everywhere; nor is it possible for any one acquainted with its nature and character, and the remedies it affords for the assertion of rights or the punishment of wrongs, to doubt that the power to exercise it, and the means of exercising it, must exist somewhere; or the administration of justice will be embarrassed, if not incomplete.

Lessee of Livingston v. Moore, 32 U.S. (7 Pet.) 469, 547 (1833).

Recognizing judicial power is incomplete without equitable jurisdiction, this Court concluded that, in sovereignties in which the judiciary lacks the full range of equitable jurisdiction, the separation of governmental powers is less than perfect:

> The natural distribution and the necessary distribution to individual security, is into legislative, executive and judicial; but it is obvious, that every community may make a perfect or imperfect separation and distribution of these powers, at its will. It has pleased Pennsylvania, in her constitution, to make what most jurists would pronounce an imperfect separation of those powers; she has not thought it necessary to make any imperative provision for incorporating the equity jurisdiction, in its full latitude, into her jurisprudence. . . .

Id. at 546-47.

2. Equity, though vital to the Judiciary and separation of powers, is not unchecked. As is appropriate in a democracy, our Constitution has relegated to Congress the ultimate say in what remedies, including equitable ones, the lower federal courts may grant. U.S. Const. art. III, § 1; *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962) (holding it consistent with Article III for Congress to limit the remedial powers of a federal court to the award of money damages); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329 (1938) (holding that Congress has the power to preclude the district courts from issuing injunctions in the absence of specific findings).

Congress' ultimate control over the lower federal courts' equitable powers, of course, does not make those equitable powers, or the separation-of-powers structure that they promote, unworthy of protection. It just makes those powers and that structure hard to protect. This Court, however, has been vigilant in protecting such fundamental structures of our Constitution in the face of Congress' express constitutional authority to alter them.

A vital weapon in this Court's arsenal for safeguarding hard-to-protect constitutional structures has been the clear (or "plain") statement rule.[3] Thus, to protect "the fundamental constitutional balance between the Federal Government and the States," in the face of Congress' express constitutional power to abrogate the

[3] A small body of academic literature discusses clear statement rules. *See generally* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 Harv. L. Rev. 1959 (1994).

States' Eleventh Amendment immunity, this Court held "that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 242 (1985). And, again, in *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989), this Court applied that "simple but stringent" clear statement test "[t]o temper congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure." Similarly, in *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991), this Court applied a clear ("plain") statement rule to protect the internal operations of a state government from Congress' constitutional authority to enact laws affecting those internal operations. Significantly, this Court stated in *Ashcroft* that the structure of state sovereignty in a federal system and separation of powers are of comparable value to our Republic. *Id.* at 458.

To protect separation of powers, this Court has enunciated a similar clear statement rule with respect to limitations on the traditional range of the district courts' equitable powers. In *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), this Court addressed the remedies available to district courts under the Emergency Price Control Act of 1942, ch. 26, § 205(a), 56 Stat. 33 (the "Price Control Act") and, in doing so, created a clear statement rule for determining the scope of relief afforded by statutes that allow resort to the district courts' equitable jurisdiction.

The Price Control Act's enforcement provision, Section 205(a), like RCRA's citizen suit provision, explicitly empowered the district courts to enforce compliance with and to enjoin past and future violations of the Act. *Id.* at 397. Like RCRA's citizen suit provision, Section 205(a) also empowered the district courts to issue "other orders" but did not specify that the term "other orders" encompassed restitution. *Id.* Nevertheless, this Court

held that the Price Control Act empowered the district courts to grant restitution. *Id.* at 402.

Acknowledging the district courts' jurisdiction under the Price Control Act "to enjoin" and "to enforce" is an equitable jurisdiction, this Court expounded on the usual scope of equitable jurisdiction.

> Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.

Porter, 328 U.S. at 398. The Court then addressed Congress' power to limit the scope of the district courts' equitable jurisdiction:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id.

This Court has reaffirmed this clear statement rule on eight subsequent occasions. *See California v. American Stores Co.*,

495 U.S. 271, 295 (1990); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542-46 (1987); *United States v. Rodgers*, 461 U.S. 677, 708 (1983); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-91 (1960); *United States v. Moore*, 340 U.S. 616, 619 (1951). *See also Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (holding "if Congress desired to make ... an abrupt departure from traditional equity practice ... it would have made its desire plain").

Notably, on two of those occasions, this Court specifically held that even when Congress simply granted the district courts power to issue injunctions, the statute under consideration also empowered the district courts to grant restitution. *Moore*, 340 U.S. at 619-20; *Mitchell*, 361 U.S. at 296.

This Court and the lower federal courts have applied the *Porter* clear statement rule in numerous regulatory settings. *See, e.g., American Stores*, 495 U.S. 271 (interpreting Clayton Act); *Amoco*, 480 U.S. 531 (interpreting Alaska National Interest Lands Conservation Act); *Weinberger*, 456 U.S. 305 (interpreting Federal Water Pollution Control Act); *Yamasaki*, 442 U.S. 682 (interpreting Social Security Act); *Bannercraft Clothing*, 415 U.S. 1 (interpreting Freedom of Information Act); *Mitchell*, 361 U.S. 288 (interpreting Fair Labor Standards Act of 1938); *Moore*, 340 U.S. 616 (interpreting Housing and Rent Act of 1947); *Porter*, 328 U.S. 395 (interpreting Emergency Price Control Act of 1942); *Reebok Int'l, Ltd. v. Marnatech Enters.*, 970 F.2d 552, 561-62 (9th Cir. 1992) (interpreting Lanham Act); *Pierce v. Amaral*, 928 F.2d 94, 96 (8th Cir. 1991) (interpreting Interstate Land Sales Full Disclosure Act); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (interpreting Securities Exchange Act of 1934); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718-19 (5th Cir.) (interpreting Federal Trade Commission Act), *cert. denied*, 456 U.S. 973 (1982).

The *Porter* clear statement rule thus has become an integral fibre in the cloth of our regulatory law.

3. In enacting RCRA's citizen suit provision, Congress specifically invoked the district courts' equitable jurisdiction when it granted them the power to "restrain".[4] Congress did not stop there, however; Congress also provided that the district courts may "order such person to take such other action as may be necessary." This Court twice has stated that Congress is well aware of the existence of the principles encapsulated in the *Porter* rule. *American Stores*, 495 U.S. at 295; *Weinberger*, 456 U.S. at 313. In RCRA's citizen suit provision, however, Congress did *not* make clear any intent it may have had to limit the district courts' equitable jurisdiction. RCRA's citizen suit provision is devoid of preclusive language. In light of *Porter*,

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[4] RCRA's citizen suit provision, 42 U.S.C. § 6972(a) provides, in pertinent part, that:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
>
> (1)(A). . . .
>
> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;
>
> . . .
>
> . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, ... to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both. . . .

Congress' inclusion in RCRA's citizen suit provision of language invoking the district courts' equitable jurisdiction without expressly limiting the scope of that jurisdiction evinces an unambiguous intent to make the traditional equitable remedies, including restitution, available to district courts addressing RCRA citizen suits.

This Court may find isolated statements in RCRA's legislative history suggesting that the district courts somehow are precluded from granting relief other than an injunction. Such isolated statements are "beside the point." *Delmuth*, 491 U.S. at 230. As this Court held in *Delmuth*, to satisfy a clear statement rule "evidence of congressional intent must be both unequivocal and *textual*." *Id.* (emphasis added). "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition [a clear statement rule] will not be met." *Id.*

B. The District Courts Properly May Grant Restitution Because That Remedy Furthers RCRA's Dual Statutory Purposes Of Promoting Prompt Remediation Of Contamination And Assuring The Party Responsible For The Contamination Incurs The Costs Of Remediation.

1. As discussed above, by failing to state clearly and unmistakably in RCRA's citizen suit provision that the district courts are precluded from granting restitution, Congress left the Judiciary free to exercise its traditional equitable power to grant such relief. Before the district courts can grant restitution under a regulatory statute, however, this Court also requires that restitution further the purposes of the statute. *See Mitchell*, 361 U.S. at 291-92 ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enact-

ment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes); *Porter*, 328 U.S. at 400 (holding that, in fashioning equitable remedies under the Emergency Price Control Act, the district courts "must act primarily to effectuate the policy of the Emergency Price Control Act"); *Hecht*, 321 U.S. at 331 (holding that the district court's equitable discretion to withhold or grant injunctive relief under a regulatory statute must be exercised in light of the large objectives of that statute).

Restitution does further RCRA's purposes. Indeed, restitution presents the best option of furthering RCRA's purposes when, as in this case, the government seeks to have a subsequent property owner remediate the contamination caused by others.

2. Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795 (1976), as an amendment to the Solid Waste Disposal Act. 42 U.S.C. §§ 6901-6992k (1988). RCRA initially had a prospective focus. Congress designed RCRA to encourage parties to minimize waste production and to require parties handling solid and hazardous wastes to observe appropriate management practices so that environmental contamination resulting from waste handling and disposal would be minimized. 42 U.S.C. § 6902 (1988).

Congress first focused on the need to address retroactively the problems of facilities contaminated as a result of past treatment or disposal of hazardous substances in 1980, when Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980), creating a retroactive, strict liability regime designed to promote prompt remediation and to assure that the "polluter pays." S.Rep. No. 848, 96th Cong., 2d Sess. 33 (1980).

By the time Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3224 (1984)

(HSWA), however, Congress apparently had realized that CERCLA would not succeed in promoting the prompt remediation of present and historical contamination problems associated with (1) all facilities engaged in the treatment, storage or disposal of hazardous waste, and (2) the improper management of petroleum underground storage tanks systems, as Congress specifically addressed these two problems in HSWA. With respect to contamination problems at treatment, storage and disposal facilities, Congress included in HSWA provisions authorizing the EPA to require "corrective action" at such facilities. Pub. L. No. 98-616, Tit. II, § 206, 98 Stat. 3239 (1984) (codified at 42 U.S.C. § 6924(u)(1988)) (requiring as a permit condition "corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility") and Pub. L. No. 98-616, Tit. II, § 233, 98 Stat. 3257-58 (1984) (codified at 42 U.S.C. § 6923(h)(1988)) (authorizing issuance of corrective action orders when "there is or has been a release of hazardous waste into the environment" from an interim status facility). With respect to preventing and remediating contamination problems associated with leaking petroleum underground storage tank systems, Congress included in HSWA an entirely new subchapter outlining management and remediation procedures associated with petroleum underground storage tank systems. Pub. L. No. 98-616, Tit. VI, § 601, 98 Stat. 3277-3288 (1984) (codified as amended at 42 U.S.C. §§ 6991-6991(i)(1988)).

At the same time that it enacted these new provisions designed to assure that parties responsible for environmental contamination promptly clean up such contamination, Congress also amended RCRA's citizen suit provision, by adding section 6972(a)(1)(B). Pub. L. No. 98-616, Tit. IV, § 401, 98 Stat. 3268 (1984)(codified at 42 U.S.C. § 6972(a) (1988)).

Through these provisions, Congress added to RCRA's prospective management focus a retroactive remedial focus that encompasses CERCLA's environmental policy goals of promoting prompt remediation of environmental contamination

and of assuring that the parties responsible for the contamination incur the costs associated with remediating the contamination.

3. When a state seeks to compel an innocent current property owner to remediate contamination resulting from the activities of a former property owner, Congress can be sure that both of its policy goals - the prompt cleanup of contamination and the shifting of costs to the culpable party - will be advanced only if district courts have the power to grant restitution to the current property owner who promptly cleans up the contamination. To understand why the availability of restitution plays a key role in facilitating Congress' dual policy goals, one simply needs to evaluate the options available to an innocent current property owner faced with a state cleanup order.

If restitution is not available under RCRA's citizen suit provision, when a state orders an innocent current property owner to remedy contamination caused by a former property owner, the current property owner has almost no incentive to remediate the contamination promptly because it has no guarantee that it can recover its costs. Rather, the current property owner has every incentive to contravene one of Congress' goals - prompt remediation - to facilitate Congress' other goal - the imposition of costs on culpable parties. Instead of promptly remediating the property and incurring the associated costs of remediation, the current property owner has every incentive, including the availability of attorneys fees, to delay remediation while pursuing a citizen suit action under RCRA directed toward obtaining an order that will force the former owner and/or operator to remediate the contamination and thereby incur the costs of remediation directly. The existence of possible independent state common law claims for damages, such as misrepresentation and breach of warranty, are unlikely to provide any significant incentive for the current property owner promptly to incur the costs of remediation given the uncertainty of recovery under such fact-dependent causes of action, particularly given

potential statute of limitations problems, and because the current owner will have to absorb all transaction costs associated with the litigation

Accordingly, if district courts do not have the authority to grant restitution under RCRA's citizen suit provision, current property owners nonetheless will make use of RCRA's citizen suit provision, but will do so in a way that promotes only one of Congress' policy goals, shifting the cost of remediation to culpable parties, at the expense of Congress' other policy goal, assuring prompt remediation. By contrast, if restitution is available under RCRA's citizen suit provision, when a state orders an innocent current property owner to remediate the property, the innocent current property owner has an incentive to remediate promptly because it can be confident that it can shift the costs of remediation to the culpable party and seek the recovery of attorneys' fees. Consequently, the availability of restitution is essential to satisfying Congress' policy goals of prompt remediation and assuring that the parties responsible for the contamination incur the costs of remediation..

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

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